FILED
FEB 13 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 603

NELSON RADIO AND SUPPLY COMPANY, INC.,
a Corporation,

Petitioner and Appellant Below,

versus

MOTOROLA, INC.,

Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.————

NELSON RADIO AND SUPPLY COMPANY, INC.,
A CORPORATION,

Petitioner and Appellant Below,

versus

MOTOROLA, INC.,

Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Nelson Radio and Supply Company, Inc., a corporation, respectfully petitions this Honorable Court for a Writ of Certiorari in this case to the United States Court of Appeals for the Fifth Circuit.

Summary Statement of the Matter Involved

This is an action brought under the Clayton Act (United States Code, Title 15, Section 15) by the Nelson Radio and Supply Company, Inc., petitioner herein, against Motorola, Inc., respondent herein, in the United States District Court for the Southern District of Alabama, Southern Division, to recover threefold damages, costs of suit and attorney's fees, based on allegations that the defendant and its co-conspirators had injured plaintiff by conduct forbidden by the Sherman Anti-Trust Act (United States Code, Title 15, Section 1). The original complaint (R. 1), having been dismissed by the court upon motion of the respondent (R. 34), was amended (R. 35), whereupon respondent filed a motion to dismiss the amended complaint for failure to state a claim upon which relief could be granted (R. 46), which motion was granted (R. 45, 50). An appeal from the judgment dismissing the action was taken to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of said District Court by a divided court of two Justices to one.

The complaint as amended (R. 35), so dismissed by the District Court, and hereafter to be referred to as "complaint", shows the following:

Plaintiff (petitioner herein) is an Alabama corporation with its principal place of business in Mobile, Ala-

bama; defendant (respondent herein) is an Illinois Corporation with its principal place of business in Chicago, Illinois, and does business in the Southern Division of the Southern District of Alabama. The defendant manufactures at its plants in Chicago and Quincy, Illinois, the following products: (a) heaters, radio receivers, radio phonograph combinations, together with parts and accessories therefor, and (b) communication equipment, with parts and accessories therefor. The products mentioned under subdivision (a) are designated by the manufacturer as "Motorola", and will hereinafter be so referred to. The Defendant's products are sold and shipped in interstate commerce to 80 distributors, of whom plaintiff was one, throughout the 48 States of the Union under annual franchise agreements cancelable upon 10 days notice by either party. Plaintiff sold defendant's products so purchased in interstate commerce, to retail dealers within the territory alloted to it under its franchise agreement, comprising 15 counties in Alabama and 13 counties in Florida. On or just prior to January 2, 1948, the defendant submitted to the plaintiff for its signature and execution a franchise agreement, containing a provision new to it, and not contained in previous franchise agreements, to the effect that the merchandise covered thereby "shall not include communication equipment", and at that time defendant notified plaintiff that it intended to sell and distribute communication equipment through its own agencies. Defendant further notified plaintiff that under said franchise agreement plaintiff would not be permitted to sell communication equipment manufactured by others in competition with defendant in its franchise territory. Plaintiff was coerced by the defendant into executing said franchise agreement dated January 2, 1948, through the defendant's wrongfully threatening (a) to terminate its then present franchise agreement; (b) to refuse to make an-

other franchise agreement with plaintiff, and (c) to cancel any new franchise agreement made between them, should plaintiff sell communication equipment in its territory in competition with defendant's communication equipment. The defendant further reserved to itself the privilege of selling and distributing in said territory and the territory of the other distributors its communication equipment; and it forbade and denied plaintiff and such other distributors the right to acquire, sell and distribute communication equipment in their respective territories in competition with defendant. During the months of November and December of 1948, and January and February, 1949, plaintiff and defendant sought to negotiate their 1949 franchise agreement. The defendant, however, would not make a new franchise agreement for that year except as to the products known as "Motorola", and then only upon condition that the plaintiff would not sell and distribute in its franchise territory communication equipment purchased from others in competition with communication equipment manufactured by defendant. Plaintiff having refused to accede to the conditions imposed upon it by the defendant and to yield to its threats, the defendant on the 10th day of February, 1949, terminated its franchise agreement of January 2, 1948, with plaintiff, and refused to enter into a new one, but other distributors of defendant did yield to its coercion, and entered into said franchise agreements under the wrongful conditions the defendant sought to impose on plaintiff. Plaintiff and its predecessor in business had sold and distributed defendant's products since the year 1931, had expended large sums of money in advertising the defendant's products, in creating a large organization to sell, distribute and service them, and had made extensive and large investments in places of business, real estate, furniture, fixtures, tools, machinery and equipment. The defendant occupies

a commanding position in the field of the products known as "Motorola", and manufactures and sells more than 50% of the communication equipment manufactured and sold in interstate commerce in the United States. Plaintiff's damages far exceed the sum of $3,000.00, exclusive of interest and costs, and were the proximate consequence of a conspiracy existing since November, 1947, between one Paul V. Calvin, the President and Director of the defendant's corporation, William H. Kelly, its Sales Manager, and its officers, employees, representatives and agents engaged in the management, direction and control of the affairs and business of the defendant, and the defendant itself, to restrain unlawfully as aforesaid commerce in interstate trade in the products known as "Motorola", and in communication equipment, in violation of Section 1 of the Sherman Act (15 United States Code, Annotated, Section 1).

This Court Has Jurisdiction

1. The statutory authority under which jurisdiction is invoked is Title 28 U. S. C. Section 1254.

2. The date of the judgment to be reviewed is December 17, 1952.

3. The lower court has held in this case that Section 1 of the Sherman Act (Title 15, United States Code, Section 1) was not violated, though the directors, executive officers, agents and employees of the corporate defendant, engaged in the management, direction and control of its affairs and business, entered into a combination and conspiracy among themselves and with said corporation, in restraint of interstate commerce, upon the ground that such directors, officers, agents and employees were acting for the corporation, a legal entity unable to conspire with

itself; and because the acts of such officers, agents, etc. were the acts of the corporation.

Questions Presented

May directors, executive officers, agents and employees of a corporation enter into a combination and conspiracy among themselves and with such corporation, in restraint of interstate commerce in violation of Section 1 of the Sherman Anti-Trust Act (Title 15, United States Code 1), so as to make them liable for damages in an action brought under the Clayton Act (Title 15, United States Code 15)? If such question be answered in the affirmative, does the amended complaint state a cause of action upon which relief can be granted?

Reasons Relied on for Allowance of the Writ

The lower court has held that directors, executive heads, agents and employees of a corporation, engaged in the management, direction and control of its affairs and business, may not enter into a combination and conspiracy among themselves and with the corporation, in restraint of interstate commerce in violation of Section 1 of the Sherman Act, upon the ground that the acts of such officers and agents are the acts of the corporation, which it is held may not conspire with itself.

A substantial federal question has been decided by the court below that is in conflict with decisions of other courts of appeal on the same matter, viz; White Bear Theatre Corporation v. State Theatre Corporation, 129 Fed. 2d. 600 (8th-CCA); Patterson v. United States, 222 Fed. 599, (6th-CCA), certiorari denied 238 U. S. 653, 59 L.Ed. 1495, and probably in conflict with the case of Lorain Journal Company vs. United States, 342 U. S. 143,

96 L.Ed. 162, although the question appears never to have been expressly decided by this court; and it is respectfully submitted that the question should be settled by this court (Supreme Court Rule 38, Paragraph 5), especially in view of such conflicting decisions, and the further fact that the Justices of the Court below by a divided court of two justices to one are in disagreement over the question.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 14,102, Nelson Radio and Supply Company, Inc., a corporation, appellant, versus Motorola, Inc., appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of the said Circuit Court be reversed by the court, and for such further relief as to this court may be proper.

NELSON RADIO AND SUPPLY COMPANY, INC.,
A CORPORATION, *Petitioner,*

By .....
Its Counsel

804 First National Bank Annex
Mobile, Alabama

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

NELSON RADIO AND SUPPLY COMPANY, INC.,
A CORPORATION,

Petitioner and Appellant Below,

versus

MOTOROLA, INC.,

Respondent and Appellee Below

No.————

BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI

Opinion of The Court Below

The opinion of the Circuit Court has not yet been officially reported, but is set out in the transcript of the record and the proceedings in the court below. The judgment of the District Court was without opinion.

Jurisdiction

This has already been set forth in the preceding petition, and is here adopted by reference.

Statement of Case

Under "Summary Statement of the Matter Involved" (petition ante), a sufficient statement is made fully to understand this case and is here adopted by reference.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the officers, directors and executive heads of the corporation engaged in the management, direction and control of its affairs and business, may not form among themselves and with the corporation a combination and conspiracy, in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1), for which the corporation itself, is liable as one of the conspirators in an action brought under Section 4 of the Clayton Act (Section 15 of Title 15 United States Code) by a person injured through such violation, although there be no third party conspirator.

2. If said Circuit Court of Appeals did so err, it likewise erred in holding that the amended complaint stated no cause of action upon which relief could be granted.

THE ARGUMENT

The Circuit Court of Appeals considered the allegation as to the existence of a conspiracy under Section 1 of the Sherman Act as a fundamental defect in the complaint, stating that it was basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. The court said:

> "A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. Here it is alleged that the conspiracy existed between the defendant corporation, its president, Calvin, its sales manager, Kelly, and its officers, employees, representatives and agents who have been actively engaged in the management, direction and control of the affairs and business of defendant. This is certainly a unique group of conspirators. * * * It is true that the acts of the corporate officers may bring a single corporation within Section 2 of the Sherman Act, which covers an attempt to monopolize, but this is not because there exists in such circumstances, a conspiracy to which the corporation is a party. And, of course, a corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade but that involves separate corporate entities. * * * Obviously, they were acting only for the defendant corporation * * * The Act does not purport to cover a conspiracy which consists merely in the fact that the officers of the single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy. The defendant is a corporate person and as such it can act only through its officers and representatives."

The court below must have overlooked this rule of law that officers and agents of a corporation, who are actively engaged in the management, direction and control of the affairs and business of the corporation, may, as individuals, though employed by the corporation and acting

in its behalf, combine and conspire among themselves to restrain interstate commerce, in violation of Section 1 of the Sherman Act, using the corporation as their instrumentality or agency for that purpose. If a combination and conspiracy among the individual officers and agents of a corporation to restrain interstate trade and commerce unlawfully, may be complete where the corporation is used as the instrumentality or agency to effectuate the unlawful restraint;-a fortiori, the corporation itself, though a legal entity, becomes a member of conspiracy since it is the agency or person through which the restraint is executed.

> The court below in the majority opinion has stated: "The officers, agents and employees are not named as defendants and no explanation is given of their non-joinder."

The court apparently overlooked the rule that each party to a conspiracy is liable both jointly and severally, and each may be so sued without joining his co-conspirators. U. S. v. Hirsch, 100 U. S. 33, 25 L.Ed. 539; McCandless v. Furlaud, 296 U. S. 140, 80 L.Ed. 121, re-hearing denied 269 U. S. 664, 80 L.Ed. 473; United States Ex Rel. Marcus v. Hess, 317 U. S. 537, 87 L.Ed. 443, re-hearing denied 318 U. S. 799, 87 L.Ed. 1163; Louis v. Ingram, 57 Fed. 2d. 463, c.d. 287 U. S. 614, 77 L.Ed. 543; Harris v. Indemnity Insurance Company of North America, 93 Fed. 2d., 459, c.d. 303 U. S. 645, 82 L.Ed. 1106; Northern Kentucky Telephone Co. v. Southern Bell Telephone and Telegraph Co., 73 Fed. 2d. 333 (CCA), c.d. 294 U. S. 719, 79 L.Ed. 1251; United Cigarette Machine Co. v. Winston Cigarette Machine Co., 194 Fed. 947, 957 (CCA); U. S. v. Wupperman, 215 Fed. 135; Motley v. Detroit Steel, etc. Co., 161 Fed. 389; Ellard v. Griffith 22 Fed. 2d. 793; Scott v. Saunders, 290 Fed. 30 (CCA); 12 C.J. page 610, Sec-

tion 178, and page 613, Section 187; 15 C.J.S. page 1028, Section 18, and 1034 Section 23. That such a conspiracy may be formed among the officers and agents of a corporation with the corporation itself to violate Section 1 of the Sherman Act has been recognized and upheld by the United States Court of Appeals for the Eighth Circuit in the case White Bear Corporation vs. State Theatre Corporation, 129 Fed. 2d. 600. That case involved an action by the owner of a motion picture theatre to recover damages against the corporation owner and its officers of the only other theatre in the town, for conspiring to violate both sections 1 and 2 of the Sherman Act. The case was dismissed by the lower court because it was "legally quite impossible to understand how the public interest could be concerned in this individual private controversy", the District Court holding that such private difficulties of the party had no effect on interstate commerce. The Court of Appeals for the Eighth Circuit reversed the District Court, stating,

> "In principle, and within the intendment of the Sherman Act, public interest is as much concerned with the improper control of the interstate market, on the buyer's or seller's side, for the little town of White Bear Lake as for the great metropolis of New York City, or for any state, or for the country as a whole;"

and then held that plaintiff's evidence of conspiracy clearly was sufficient to go to the jury as against the defendant State Theatre Corporation and two of its officers, and ordered a new trial.

In Patterson vs. U. S., 222 Fed. 599, certiorari denied 238 U. S., 635, 59 L.Ed. 1495, the United States Court of Appeals for the Sixth Circuit held on page 618, that;

> "The section includes conspiracies between competitors, or *between the officers and agents of a competitor*

> *on its behalf against a competitor.* But it is not limited to such conspiracies. It includes also conspiracies between any persons, whoever they may be, against any other person."

Government counsel in the case of Lorain Journal Company vs. United States, 342 U. S. 143, 96 L.Ed. 162, evidently thought it well settled that a corporation could conspire with its officers to violate Sections 1 and 2 of the Sherman Anti-Trust Act, since the complaint there was based, among other things, upon such conspiracies, and as pointed out by Mr. Justice Rives in his dissenting opinion in the court below,

> "That thought did not occur to Mr. Justice Burton when he included in the statement of the Lorain Journal Case, supra, the following:
> 'The complaint alleged that the corporation, together with four of its officials, was engaging in a combination and conspiracy in restraint of interstate commerce in violation of Section 1 of the Sherman Antitrust Act, and in a combination and conspiracy to monopolize such commerce in violation of Section 2 of the Act, as well as attempting to monopolize such commerce in violation of Section 2. 342 U. S. 143, 145'."

Mr. Justice Rives in his dissenting opinion likewise thought that government counsel in the case of Timken Roller Bearing Co. v. U. S., 341 U. S. 593, 95 L.Ed. 1199, conceded too much.

It is respectively submitted that since the decision of the lower court is in conflict with the decisions of other courts of appeal and probably with a decision of this court, and since it is a decision upon an important question of federal law which should be settled by this court, the petition for certiorari herein should be granted.

Should this court hold that such a conspiracy may be formed in restraint of interstate commerce in violation of

Section 1 of the Sherman Act, then it is respectfully submitted that the complaint (R. 35) is sufficient and states a cause of action upon which relief could be granted. The criticism of the majority opinion of the lower court in this respect runs wholly to the form of the complaint, and not to any fundamental defect. In fact, Mr. Justice Rives in his dissenting opinion so interpreted the majority opinion when he said:

> "The majority would apparently have no trouble with the case if it involved two corporate entities; for example, if one corporation manufactured the equipment and a subsidiary or separate corporation attended to its sales and distribution."

But, aside from this, it is respectfully submitted the complaint is sufficient. Its averments charge conduct analogous to that condemned by the Circuit Court of Appeals for the 7th Circuit in the case of the United States v. General Motors Corp, et al, 121 Fed. 2d. 376. It presents these three elements, namely, (1) a conspiracy, (2) interstate trade, (3) unreasonable restraint of trade. A conspiracy is shown by the allegations of the complaint to restrain the movement of the respondent's products known as "Motorola", and "Communication Equipment" in interstate commerce, by restraining its 80 distributors in 48 States in selling the defendant's products, and in the free running of their own business affairs. As to (2), the complaint shows that "Motorola" and "Communication Equipment" were products in interstate commerce, being shipped from Quincy and Chicago, Illinois, their places of manufacture into the channels of trade across state lines where they are received and sold and distributed by 80 distributors located in the 48 States of the Union under franchise agreements allotting territory to the several distributors. As to (3), the complaint shows concerted activity of the respondent

and its co-conspirators the executive heads of the defendant corporation for whose conduct it is responsible in unreasonably restricting trade in the defendant's products. The insistence made by the respondent in the court below that only a private wrong is alleged, we submit, is unfounded. The conduct of the respondent in enforcing obedience upon its distributors not to sell communication equipment in competition with communication equipment manufactured by it in the territory allotted to the distributors necessarily restricts the outlets of "Motorola" and "Communication Equipment." It is no answer to say that there are many other persons willing to step into the shoes of the distributors of the respondent's products, who will agree to and bind themselves to distribute and sell "Motorola" and surrender their right to sell communication equipment in competition with that manufactured by respondent. In the General Motors Corporation case, supra, the court stressed time after time the right of the dealers of General Motors automobiles to conduct their business freed from unreasonable restraint by the defendants. The court there recognized that every dealer made substantial investments in buildings, equipment, accessories, and in building up good will; and that consequently a cancelled dealership left General Motors "*with one less retail outlet that could be replaced readily,* but leaves the franchise dealer without a business and burdened with his substantial investment in the liquidation in which he is likely to sustain a heavy loss" (121 Fed. 2d. 398). The fear of cancellation or refusal to renew contracts was likewise recognized by the court; so much so, that the dealers there were reluctant to refuse the terms and policies dictated by the appellants. And the court found that though the sales of automobiles by General Motors were increased during the period of the conspiracy, that this did not disprove either the existence of the conspiracy or that its

tendency was to restrain trade in interstate commerce. It is submitted that the case of Fedderson Motors, Inc. v. Ward, 180 Fed. 2d. 519 (CCA 10th), so heavily relied upon by respondent in the court below cannot by its language operate against this argument. The statement there, that

> "No facts were alleged from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature, or result of the conspiracy was that fewer automobiles moved in interstate commerce from Detroit, Michigan, into Colorado, or other destination; or that less Hudson automobiles were available for purchase in the markets, either in Colorado or elsewhere; or that the quality of the Hudson cars was lowered in any manner." ,

does not justify any conclusion from the allegations of the present complaint, other than that the conduct charged to the respondent had a tendency to restrain trade in interstate commerce in "Motorola" and "Communication Equipment". And especially is this true, when it appears from the complaint that there are more than 80 distributors in the 48 States of the Union who sell to retail dealers in their respective territories, and that the respondent is one of the commanding or dominant manufacturers of products called by it "Motorola"; and that it manufactures more than 50% of communication equipment manufactured and sold in interstate commerce in the United States. If the public in petitioner's territory, comprising 15 counties in Alabama and 13 counties in Florida, is deprived of sources — even temporarily—through replacement of the distributor of that territory, from which to acquire products manufactured by respondent, and sold and distributed by petitioner to retailers in said territory, how much more is the public of 48 States injured by such misconduct on defendant's part?

It was most significant to the Court, speaking through Mr. Justice Black, in the case of Fashion Originators Guild v. Federal Trade Commission, 312 U. S. 457, 85 L.Ed. 945, that the appellants' conduct there narrowed

> "the outlets to which garment and textile manufacturers who sell and the sources from which retailers can buy."

See also W. W. Montague & Co. v. Lowry, 193 U. S. 39, 48 L.Ed. 608, and Standard Oil Company v. U. S. 337 U. S. 293, 93 L.Ed. 1371, affirming 78 Fed. Sup. 850.

Paragraphs 11 and 12 of the complaint (R.43) charge that the respondent is selling and shipping its products to its other distributors throughout the United States in interstate commerce, under a distributor's agreement similar to the one attached as Exhibit "A" to the complaint, after having wrongfully coerced said distributors into executing said agreement, but only upon the condition and promise on the part of said distributors, that they would not sell and distribute communication equipment in competition with the respondent's communication equipment.

It is further averred that respondent manufactures more than 50% of the communication equipment manufactured and sold in interstate commerce in the United States, and that such agreement or understanding that the distributors would not use or deal in communication equipment of the competitors of the said respondent, had effect of substantially lessening competition in interstate commerce, and was unlawful. This allegation in effect charges that the respondent through coercion is enforcing upon its distributors contracts or agreements violative of Section 3 of the Clayton Act (15 United States Code Annotated, Section 14), forbidding such agreements. In other words, appellee by threatening to cancel the contracts of its distributors com-

pels them to violate the Clayton Act; and when petitioner would not enter into such a contract and yield to respondent's coercion, it cancelled its franchise. It is respectfully submitted that the tendency of such conduct is to restrain trade in "Motorola" and "Communication Equipment" in interstate commerce.

If a single individual may be found guilty of violating Section 3 of the Clayton Act, when he makes an agreement with his purchaser not to sell or deal in the goods, wares or merchandise of his competitor, the effect whereof may be to substantially lessen competition, how much greater is the wrong where a conspiracy is formed by the seller and his co-conspirators to prevent a purchaser from selling or dealing in the merchandise of the seller's competitor, when the seller himself refuses to sell his own merchandise to such purchaser? The language of Section 1 of the Sherman Act denounces every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states. Section 3 of the Clayon Act denounces as unlawful for any person engaged in such commerce to make a contract for the sale of goods with the understanding that the purchaser shall not use or deal in the goods of the competitor of the seller where the effect of such contract is to substantially lessen competition. For the respondent and its directors and executive heads to conspire among themselves to cancel petitioner's contract for the purchase and distribution of a part of its commodities, unless petitioner should forego its right to deal in other commodities, which the respondent had refused to sell to it, we submit when taken with the other allegations of the complaint is an undue restraint of trade. At least it certainly tends thereto, for such acts (1), lock out petitioner and the many other distributors of respondent's products from sources of competitive products, namely

"Communication Equipment" manufactured by others, originating in interstate commerce; (2) they deny to petitioner access to competitive products; (3) they deny to manufacturers of competitive products access to outlets controlled by respondent through its Distributor Agreements, a copy of which is attached to the complaint; and (4) constitute an unreasonable restraint in trade and commerce among the states. It is not sufficient for respondent to blandly brush aside the contention of undue restraint by suggesting that "Motorola" and Radio Equipment manufactured by it will be sold by persons other than petitioner. The tendency of the practices of the respondent towards undue restraint of trade and commerce among the states is obvious. If defendant refused not only to permit petitioner to purchase its own radio equipment but conditions the sale of its other manufactured products to petitioner upon its not selling or dealing in radio equipment of other manufacturers, what is the natural tendency of such a practice if it be not to unduly restrain interstate commerce?

In the case of Montague and Co. v. Lowry, 193 U. S. 39, 48 L.Ed. 608, suit was brought by plaintiff against the defendant for the violation of the Sherman Act. Among other things, it was alleged that the manufacturers who were members of an association agreed not to sell their products or wares to non-members of the association at any price, under penalty or forfeiture of membership. In mentioning the illegality of the agreement, Mr. Justice Peckam had this to say:

> "The agreement, therefore, restrained trade for *it narrowed the market for the sale of tile in California from the manufacturers and dealers* therein in other states, so that they could only be sold to the members of the association. * * * ".

And, again, he said:

> "Again, it is contended the sale of unset tile is so small in San Francisco as to be a negligible quantity; that it does not amount to 1 per cent of the business of the dealers in tile in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small, it would probably largely increase when those who formerly purchased tile from the manufacturers are shut out by reason of the association and their nonmembership therein from purchasing their tile from those manufacturers, and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tile would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable to longer compete with their rivals who were members. In either event, the combination, if carried out, directly effects a restraint of interstate commerce."

The Character of the Restraint

The Courts have made it quite clear that Section 1 of the Sherman Act brands as illegal the character of the restraint and not the amount of commerce affected; and, hence the amount of interstate or foreign commerce involved is not material. As an example of this statement, certain defendants were indicted for conspiracy to restrain interstate commerce, in violation of Section 1 of the Sherman Act. The defendants' acts involved merely a single shipment of tobacco in interstate commerce, and the argument was made that a single transaction does not amount to trade or business; and that it was such an insignificant interference with interstate commerce as to be disregarded, the argument having been made upon the supposed holding in the Standard Oil and Tobacco cases, 221 U. S. 1, 55 L.Ed. 619,663, to the effect that in order to be covered by quantity, that is, of an unreasonable amount. But, on affirmance of

a conviction of the defendants, the United Stateses Court of Appeals for the Sixth Circuit, in the case of Steeers et al v. United States, 192 Fed., page 1, at page 5, had ththis to say:

"We do not find in the Standard Oil and Tobabacco Cases any holding that a direct restraint of trade mmust affect an unreasonable great amount of commerce in in order to be within the prohibition. As we read these se opinions, the matter under consideration, from the stanandpoint of reason, was not the amount of merchandise e or traffic affected by the restriction, but the character a· and extent of the restriction itself; and it was thought thahat, if such restriction reasonably pertained to lawful resusults, it was not of itself necessarily forbidden. These opipinions contain no justification for the idea that a direcect and absolute restraint, bearing no reasonable relationon to lawful means of accomplishing lawful ends, can be e permitted only because the volume of traffic affected is is not very great.

"It is true that the theory of injury to the p public lies at the bottom of the statute, and that it is is directed against things which tend 'to deprive the pubublic of the advantages which flow from free competitionon' (Northern Securities Case, 193 U. S. 197, 332, 24 Supup. Ct. 436, 454, 48 L.Ed. 679); but a single, private in injury may well tend to this public result."

The Court of Appeals for the Eighth Circuit it in the case of White Bear Theatre Corporation v. State Theheatre Corporation, 129 Fed. 2d. 600 at 605, said:

"What relationship the commerce of White E Bear Lake bore in the interstate market to that of the ie immediate four-state area serviced, or to that of the indndustry as a whole, would be quite immaterial. In princinciple, and within the intendment of the Sherman Act, t, public interest is as much concerned with the impropoper control of the interstate market, on the buyer's or selseller's side, for the little town of White Bear Lake as for or the great metropolis of New York City, or for any stastate, or for the country as a whole." ,

citing Montague & Co. v. Lowry, supra,; United States v. Socony-Vacuum Oil Co., Inc., 310 U. S. 150, 84 L.Ed. 1129. To the same effect see, U. S. v. General Motors Cor., 121 Fed. 2d. 376; Indiana Farmers Guide Pub. Co. v. Prairie Farmers Pub. Co., 293 U. S. 268, 79 L.Ed. 356; International Salt Co. v. U. S., 68 Sup. Ct. Rpt., page 12, 332 U. S. 392, 92 L.Ed. 20; Fashion Originator's Guild v. Federal Trade Com., 312 U. S. 455, at 466, 85 L.Ed. 949, at 953.

THE DEFENDANT COULD NOT USE THE POWER (RESERVED IN THE FRANCHISE AGREEMENT) TO CANCEL THE AGREEMENT IN SUCH A WAY AS TO ACCOMPLISH AN UNLAWFUL PURPOSE, i. e., VIOLATION OF THE SHERMAN ACT.

This proposition is so fundamental that its truth is recognized from its mere statement. An illuminating and interesting case on this point is United States v. General Motors Corp., et al, supra, and its offspring, Emrich Motors Corp. v. General Motors Corp. et al, 181 Fed. 2d 70, reversed on another point 95 L.Ed. 534, 340 U. S. 558. The complaint in the latter charged that the defendants, together with certain of their officers, directors and agents "engaged in a conspiracy in restraint of * * * trade and commerce among the several states in Chevrolet, Cadillac, LaSalle, Buick, Oldsmobile and Pontiac automobiles." Plaintiff was a dealer who had refused to finance its cars through the United States Acceptance Corporation, which was a wholly owned subsidiary finance company of General Motors Corporation. The indictment in the criminal case, U. S. v. General Motors Corporation et al, supra, charged that, pursuant to the conspiracy alleged, the defendants had arranged and agreed among themselves:

> "To require dealers to promise to finance with GMAC and not to finance with any other company as a condi-

tion of obtaining GMAC dealer franchises (pars. 37, 38). To limit to one year all dealer franchise and reserve right to terminate at will on short notice in order to exercise the right in cases where dealers refused to finance with GMAC or financed with other companies (par. 39). To threaten to cancel and to cancel dealer franchises for failure to finance with GMAC or for using other finance companies (pars. 40, 41).

To refuse to deliver cars to dealers who failed to finance with GMAC or financed with others (pars. 42, 43). To delay delivery of automobiles to dealers who financed with companies other than GMAC (par. 51).

To discriminate in favor of dealers who financed with GMAC and against those who financed with others in regard to number, model, color, and style of automobiles delivered by GMAC (par. 52).

To require dealers not to promote the use of any financing service other than GMAC (par. 59)."

In the civil suit by plaintiff against the defendants, plaintiff charged every act alleged in the indictment and, in addition, charged that the defendant General Motors Corporation had:

"(a) Terminated plaintiff's two Chevrolet dealerships; and

(b) Terminated or threatened to terminate franchises of other GMAC dealers who used or were willing to induce retail purchasers to use, the finance service of GMAC."

The decision of the Supreme Court of the United States in 95 L.Ed. 534, 340 U. S. 558, likewise had this to say:

"The specific conduct embraced within the illegal concert of action is described in paragraphs 36 to 67 of the indictment * * *: (1) Requiring dealers to promise to use GMAC exclusively as a condition to obtaining a franchise for the sale, transportation and delivery of auto-

mobiles; (2) Making contracts for short periods and cancelable without cause, canceling or threatening to cancel such contracts unless GMAC facilities are used; (3) Discriminating against dealers not using GMAC by refusing to deliver cars when ordered, delaying shipment and shipping cars of different number, model, color, and style; * * * (8) compelling dealers to refrain from using other finance companies by all other necessary, appropriate or effective means."

In the decision of the same case on appeal by the United States Court of Appeals for that Circuit, 181 Fed. 2d., page 73, it is stated that the specific conduct charged in furtherance of the illegal purpose was:

"(1) Requiring dealers to promise to use GMAC exclusively as a condition to obtaining General Motors franchises; (2) making contracts for short periods and cancelable without cause, canceling or threatening to cancel such contracts unless GMAC facilities were used; * * * and (3) compelling dealers to refrain from using other finance companies by all other necessary, appropriate or effective means."

These decisions all clearly sustain the proposition that a manufacturer cannot use the power (reserved in a contract like the one in this case) to cancel the contract in such a way as to accomplish an unlawful purpose, i. e., violation of the Sherman Act.

THE COMPLAINT SUFFICIENTLY SETS OUT THE FACTS SHOWING A VIOLATION OF SECTION 1 OF THE SHERMAN ACT AND THE DETAILS OF THE CONSPIRACY.

The allegations of the complaint in this case are as detailed and specific as good pleading requires, and comes clearly within the decisions of Mitchell Woodbury Corporation v. Albert Pick Barth Company, Inc., et al, 41 Fed. 2d. 148 (CCA); Forgett vs. Scharf, 181 Fed. 2d. 754; Lynch

v. Magnavox Company, 94 Fed. 2d. 883 (CCA); Sidney Morris and Co. vs. National Assn. of Stationers, Office Outfitters and Manufacturers, et al, 40 Fed. 2d. 620 (CCA); Cleaves v. Peterboro Basket Co., 54 Fed. 2d. 101; see also allegations of indictments in U. S. vs. General Motors Corp. 121 Fed. 2d. 376; Pevely Dairy Co. vs. U. S., 178 Fed. 2d. 363.

It is further respectfully submitted that the complaint in this case shows injury to the public, differing in this respect from the cases of Fedderson Motors v. Ward, 180 Fed. 2d. 519 (CCA 10th), and the Shotkin v. General Electric Co., 171 Fed. 2d. 236. In this case the conspiracy is nationwide. It involves the business, practices and conduct of 80 distributors in the 48 States of the Union. Unless they yield to the coercion and threats of the respondent their franchises are cancelled as was the petitioner's *franchise cancelled in this case.* When the franchise is cancelled the inevitable consequence so clearly described in U. S. v. General Motors Corp., 121 Fed. 2d. 376, at 398, results, namely:

> "Consequently, the cancelled dealership leaves the appellants with one less retail outlet that could be replaced readily, but leaves the franchise dealer without a business and burdened with his substantial investment in the liquidation in which he is likely to sustain a heavy loss."

As to petitioner, this result actually obtained; and no one can doubt that the tendency of such practices on the part of the respondent is to restrict the outlets of its products, and hence, to restrain commerce in respondent's products. If, instead of slavishly yielding to the respondent's coercion and threats, the other 79 distributors had refused to do so, and submitted to the cancellation of their contracts, instead of there being one less distributor outlet for the

respondent's products, the number would have been multiplied by 80.

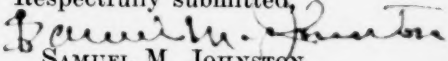
If the character of the restraint is what determines the illegality of the conspiracy, and not the amount of commerce affected, then certainly the conspiracy here is illegal. It works a public injury and, as the petitioner has suffered from it, a cause of action has accrued to petitioner. W. W. Montague & Co. v. Lowry, supra; Steers et al v. United States, supra; White Bear Theatre Corp. v. State Theatre Corp., supra; U. S. v. General Motors, Corp., supra.

In neither the Fedderson Motors v. Ward Case, supra, nor Shotkin v. General Electric, supra, were there facts tending to show that the conspiracy affected any one other than plaintiff, nor that its tendency was to restrain interstate trade. In this case the complaint shows that the respondent manufactures more than 50 per cent of the communication equipment sold and distributed in interstate commerce, and that it occupies a commanding position in those products of its own manufacture to which it has attached the nomenclature of "Motorola". In addition to the above, to require its distributors to forego their rights and freedom of trading in communication equipment of others, as a condition to distributing respondent's products known as "Motorola" not only contravenes the very spirit of Section 3 of the Clayton Act (15 United States Code Annotated, Section 14), but actually violates Section 1 of the Sherman Act if the allegations of the complaint are taken as true.

We respectfully submit that this court should grant the writ of certiorari in this case and determine the federal questions presented, and that upon the hearing

thereof the judgment of the lower court should be reversed and the case remanded for trial.

Respectfully submitted,



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FILED
MAR 18 1953
HAROLD B [redacted] Clerk

IN [redacted]

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 603

NELSON RADIO AND SUPPLY COMPANY, INC.,
A CORPORATION,
Petitioner,

vs.

MOTOROLA, INC., A CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 603.

NELSON RADIO AND SUPPLY COMPANY, INC., A CORPORATION,

Petitioner,

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The two courts below have correctly decided that respondent-manufacturer had the right to refuse to deal further with petitioner-distributor upon the expiration of its franchise contract on December 31, 1948. In applying the anti-trust laws to this business dispute between a single manufacturer and one of its eighty wholesale distributors, the courts adopted well settled principles of long standing, and the case presents no novel, significant or important legal issue worthy of consideration by this Court.

The opinion of the Court of Appeals below is not in conflict with any opinion of this, or any other court, but

is in harmony with all reported federal cases which have passed upon the application of the anti-trust laws to a simple refusal to deal on the part of a single corporate trader.

Petitioner seeks to avoid consideration of the basic right of respondent to refuse to deal in the circumstances disclosed by posing the main question for decision in the form of an abstract problem supposedly of some general importance to the meaning of "conspiracy" in Section 1 of the Sherman Act.

We feel it necessary therefore to delineate the real nature of the case presented.

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit (R. 58-65), which opinion affirmed the order of the District Court finally dismissing the petitioner's amended complaint for failure to state a cause of action, is reported in 200 F. 2d 911.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE.

We add the following factual statement and comments to petitioner's statement of the case.

Petitioner had for many years been the sole distributor of respondent's "Motorola" products in 28 counties franchised to him in southern Alabama and northern Florida, pursuant to one-year contracts, which were cancellable on 10 days' notice by either party, and which by their terms expired on December 31st of each year and required express renewal. (R. 22, 24, 5.) During those years (except

for the war years) respondent had chosen to honor petitioner's direct sales of communications equipment manufactured by respondent even though communications equipment was not specifically included in the merchandise defined in the distributor's agreement between them. (R. 12-13.) Whether this privilege of selling communications equipment direct to the ultimate users was available to other distributors and, if so, whether and to what extent it was taken advantage of by any of them, is nowhere disclosed in the amended complaint.

Communications equipment, that is, specially-engineered two-way radio systems, is in the so-called "commercial" line of the respondent's products and had been the subject of major technical change and advancement during World War II. Motorola's "domestic line" consisted of heaters, radios, and television sets—standardized consumer appliances, sold at wholesale by the distributor to retailers for resale to the ultimate users.

Shortly prior to January 2, 1948, upon the expiration of the 1947 annual contract, Motorola notified petitioner that it would no longer honor petitioner's sales of communications equipment because respondent had adopted a policy of direct sales of this equipment by its factory-supervised engineers; and it evidenced this change in policy by reciting expressly in the form of franchise agreement tendered that "the 'merchandise' referred to in this contract shall not include communications equipment."

Insofar as the amended complaint reveals, all of respondent's distributors accepted this policy change; the allegations of "coercion" in the amended complaint and the characterization in petitioner's Brief (p. 27) of this acceptance as a "slavish yielding" on their part are gratuitous and supported by no factual allegations whatever.

Petitioner, however, refused to accept this policy change, so that a year after the policy went into effect, and in the months of January and February, 1949, during the negotiations of a renewal franchise contract between the parties, we find (R. 41) "the plaintiff insisting upon its "right and privilege" EITHER to be allowed to acquire, sell and distribute the defendant's communications equipment and parts and accessories therefor, OR to be allowed to continue to sell the other merchandise included within the term 'Motorola' manufactured and sold by the defendant, together with communications equipment acquired from other manufacturers."

It is implicit in the language "*continue* to sell * * * communications equipment acquired from other manufacturers" that petitioner was, in fact, distributing such communications equipment at the time of the negotiations. Respondent declined to accept either of the alternatives presented and refused to deal further with petitioner.

As the Court of Appeals stated in this connection, "when the defendant severed their business relations on February 10, 1949, it did not terminate an existing contract which still had some period of time to run. On the contrary, it was actually a mere refusal to deal further with the plaintiff." (R. 64.)

The amended complaint contains no allegation that any other Motorola distributor then or at any other time—(a) faced Motorola with a like ultimatum; (b) arrogated to itself Motorola's right to select its own customers; or (c) had undertaken, or desired to undertake, the sale of specialized communications equipment manufactured either by Motorola or by others.

The original and amended complaints were dismissed for the reasons set forth in respondent's motion to dismiss (R. 46-47), namely, that the complaint failed to set forth

any violation of the anti-trust laws, that the complaint failed to disclose the restriction of any public right in trade or commerce, and that the complaint failed to set forth any proximate connection between the alleged injury to the petitioner and the violation by the respondent of the anti-trust laws.

Petitioner's Theory of the Case.

Petitioner relies upon and asserts, as its claimed cause of action under the anti-trust laws, that the managing officers of respondent corporation formed with the corporation "a combination and conspiracy in violation of Section 1 of the Sherman Act." (Petition 6, 11.)

No claim or argument is, or has been, asserted or made that the complaint sets forth an alleged violation of Section 2 of the Sherman Act, that is, that respondent has "monopolize[d], or attempt[ed] to monopolize, or combine[d] or conspire[d] with any other person or persons, to monopolize any part of the trade or commerce among the several States. * * *" (15 U. S. C., § 2.) No allegations are made which would support, even by indirection, a valid claim of monopolization.

Nor is petitioner's claim based on any alleged direct violation of § 3 of the Clayton Act. (15 U. S. C., § 14.) It is obvious that, since petitioner's claimed injury is the *absence* of a contract with respondent, § 3 of the Clayton Act has no specific applicability here. Accordingly, the petition does not question, as a matter specified for presentation by the petition, the correctness of the holding of the Court of Appeals to the same effect. (R. 64-5.)

It is likewise clear that petitioner's observation in its Brief (p. 19), that one of the allegations in paragraph 12 of the amended complaint "in effect charges that the re-

spondent through coercion is enforcing upon its distributors contracts or agreements violative of Section 3 of the Clayton Act * * *'' does not purport to represent the thrust of petitioner's alleged claim. Petitioner here cannot really be claiming that exclusive-dealing wholesale distributorships are unlawful—for it brings this suit on the very ground that it has a ''right'' to be not only defendant's exclusive ''domestic line'' distributor but also its exclusive ''commercial line'' distributor. The holding of the Court of Appeals that petitioner is obviously not injured by the contracts of other distributors in other territories is not questioned. (R. 64.) In short, petitioner's conclusory references to Section 3 of the Clayton Act are neither the basis of the cause of action asserted by petitioner nor are they the matter specified as presented by the petition. It is a question of the existence *vel non* of ''a conspiracy * * * in restraint of interstate commerce in violation of Section 1 of the Sherman Anti-Trust Act'' that petitioner presents to this Court. (Petition, 6; Brief, 11, 24.)

Whether ''directors, executive officers, agents and employees of a corporation [may] enter into a combination and conspiracy among themselves and with such corporation, in restraint of interstate commerce in violation of Section 1 of the Sherman Anti-Trust Act'' is an abstract question which has no real meaning unless and until the nature and scope of the particular restraint of trade allegedly effectuated by the so-called ''conspiracy'' is first determined. And the facts heretofore outlined make it clear that petitioner's claim is that *respondent's refusal to deal is the restraint of trade complained of** and that this re-

* Petitioner (Brief 20) concedes this viewpoint while couching the refusal to deal in Sherman Act verbiage: ''For the respondent and its directors and executive heads to conspire among themselves to cancel petitioner's contract for the purchase and distribution of a part of its commodities, unless petitioner should

fusal to deal is complained of as such and not because it was done pursuant to any over-all scheme, either vertical or horizontal, for the respondent-manufacturer to control the price or conditions of resale to retailers or to the general public. Thus, only if it is first decided that there is involved here something more than a lawful refusal to deal by a single corporation, is the question reached whether the technical requirements of conspiracy under Section 1 of the Sherman Act can be satisfied.

The theory, whereby petitioner attempts to make a "conspiracy in restraint of trade" out of a situation in which there is alleged only the individual refusal by a single corporation to deal with petitioner, appears to be:

> (1) That the franchise contract tendered to petitioner would, if it had been signed, have allegedly violated § 3 of the Clayton Act;
>
> (2) That a refusal to deal for the reason that a person will not sign a contract thus allegedly violative of § 3 of the Clayton Act constitutes an attempt to restrain trade, which *attempt* is a restraint of trade within the meaning of § 1 of the Sherman Act; and
>
> (3) That the decision of the executive officers of a single corporation that the corporation will so refuse to deal is also a "conspiracy" within the meaning of § 1 of the Sherman Act.

This reasoning is plainly an effort somehow to work out a theory that a mere *attempt* by a single corporation allegedly to violate Section 3 of the Clayton Act is perforce a violation of Section 1 of the Sherman Act—although neither one of these statutes is independently violated, and although neither one contains a provision similar to Section 2 of the Sherman Act, which expressly makes an

---

forego its right to deal in other commodities, which the respondent had refused to sell to it, we submit when taken with the other allegations of the Complaint is an undue restraint of trade. At least it certainly tends thereto * * *."

attempt to monopolize by a *single person* a restraint of trade.

Question Presented.

As the petitioner does not purport to base its claim on a conspiracy or attempt to monopolize under Section 2 of the Sherman Act by respondent, and as petitioner does not complain of any injury resulting from the existence of contracts with respondent's distributors in areas outside petitioner's particular territory, the general question presented for review by the petition herein may more accurately be stated as follows:

> *Is a refusal to deal with a wholesale distributor by a single manufacturing corporation a "conspiracy in restraint of trade" within the meaning of § 1 of the Sherman Act, in the absence of any claim that such refusal to deal (1) was part of a purpose to create or maintain a monopoly under Section 2 of the Sherman Act or (2) was a step in the effectuation of a horizontal or vertical concert of action in restraint of trade affecting the price or conditions of resale to retailers and to the public?*

Respondent submits that the answer given to this question by the Court of Appeals, and the respective answers against each of the three essential steps or propositions in petitioner's apparent theory of the case, as above outlined, are so well-settled and sound in principle—and have been so uniformly adhered to in the federal courts—that the present case of the loss of a franchise by one of the distributors of one of the many companies competing in the radio and communications field presents no federal question of substance and does not warrant review by this Court.

ARGUMENT.

I.

THE PETITION PRESENTS NO FEDERAL QUESTION OF SUBSTANCE.

The Anti-Trust Laws Accord to a Manufacturer the Right to Refuse to Deal With Any Other Person for Reasons of His Own Choosing. Such a Simple Refusal to Deal Is, Far from Being a Restraint of Trade, Recognized As Essential to the Existence of Competition.

The right of every trader in private business to refuse to sell to anyone for any reason he sees fit is so well established that it cannot be controverted. See, *e. g., United States* v. *Colgate Company,* 250 U. S. 300, 307; *Lorain Journal Co.* v. *U. S.,* 342 U. S. 143, 155; *Kiefer-Stewart Co.* v. *Seagram,* 340 U. S. 211, 214; *United States* v. *Bausch & Lomb,* 321 U. S. 707, 728-9; *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.,* 227 Fed. 46, 49 (C. C. A. 2d, 1915); *Brosious* v. *Pepsi-Cola Co.,* 59 F. Supp. 429, 431, 432, aff'd 155 F. 2d 99, 102 (C. A. 3rd, 1946); *Arthur* v. *Kraft-Phenix Cheese Corp.,* 26 F. Supp. 824, 828 (D. Md., 1938); *United States* v. *Imperial Chemical Industries,* 105 F. Supp. 215, 244 (S. D. N. Y., 1952); *Dublin Distributors* v. *E. & J. Burke,* 109 F. Supp. 125, 127 (S. D. N. Y., 1952). This right is expressly preserved in the Clayton Act (15 U. S. C. A. § 13(a)). Without the right of refusal to deal all private business would be subject to the duties of a public utility.

The right to refuse to deal may be exercised *for any reason,* including the fact that a manufacturer does not feel that the scope of the activities in which the distributor in-

sists upon engaging (as, for example, dual representation) is for the best interests of the manufacturer. *Dublin Distributors* v. *E. & J. Burke*, 109 F. Supp. 125, 127-8 (manufacturer cutting off its distributor of domestic ale when distributor took on sale of the imported ale of another manufacturer). See also, *Pittsburgh Plate Glass Co.* v. *Jarrett*, 42 F. Supp. 723 (M. D. Ga., 1942), *aff'd* 131 F. 2d 674 (C. A. 5th, 1942) (manufacturer, wishing to market its product directly, terminated dealer's franchise); *Fargo Glass Co.* v. *Globe American Co.*, (C. A. 7th, 1953) (¶ 67, 427 CCH 1953 Trade Cases) (manufacturer, taking over new product and wishing to use its existing distributors, terminated franchises of former dealers in that product).

The right to refuse to deal may also be exercised for the reason that the person refused will not enter into an agreement which it may be presumed would, if made, and actually observed, be an unlawful restraint of trade. *United States* v. *Colgate & Co.*, 250 U. S. 300 (price-fixing agreement); *F. T. C.* v. *Gratz*, 253 U. S. 421 (tie-in agreement); *F. T. C.* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565 (agreement not to deal with competitor); *Brosious* v. *Pepsi-Cola Co.*, 59 F. Supp. 429, aff'd 155 F. 2d 99 (C. A. 3rd, 1946) (agreement not to deal in goods of competitor). The authorities are clear on this point. See also, *F. T. C.* v. *Beechnut Co.*, 257 U. S. 441, 452, 454, and cases cited in the first paragraph, *supra*.

The only qualification on the right to refuse to deal is that it must not be exercised merely as a part of—or, as a means in—a broader scheme either (a) to monopolize commerce, under § 2 of the Sherman Act (*Lorain Journal Co.* v. *U. S.*, 342 U. S. 143, 155; *United States* v. *Colgate & Co.*, 250 U. S. 300, 307), or (b) by horizontal or vertical agreement and concert, to affect the sales of a particular product and to control the conditions of resale to retailers and the general public (*F. T. C.* v. *Beechnut Co.*, 257 U. S.

441; *United States* v. *General Motors Corp.*, 121 F. 2d 376; *Fashion Originators Guild* v. *F. T. C.*, 312 U. S. 457). See also, *Montague* v. *Lowry*, 193 U. S. 38. In such cases it is the broader scheme, to monopolize, or to control the marketing of the product all the way through to the hands of the consumer, that constitutes the restraint of trade. The refusal to deal is not outlawed as such, but only because it is one of the means used to effectuate the restraint of trade involved. No such broader, over-all scheme in restraint of trade is alleged in the present case, and the cases involving such broader schemes clearly point out themselves the distinction between the situation there and the case at bar. *F. T. C.* v. *Beechnut Co.*, 257 U. S. 441, 454; *United States* v. *General Motors Corp.*, 121 F. 2d 376, 400, 403, 404, 411-12; *Fashion Originators Guild* v. *F. T. C.*, 312 U. S. 457, 467-8; *Montague* v. *Lowry*, 193 U. S. 38, 45. See also, *Eastern States Retail Lumber Dealers Assoc.* v. *U. S.*, 234 U. S. 600, 614; *Brosius* v. *Pepsi-Cola Co.*, 59 F. Supp. 429, 432, aff'd 155 F. 2d 99 (C. A. 3rd, 1946); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 829 (D. Md., 1938).

A. Petitioners' Complaint Discloses No Facts Showing That Public Injury to Free Competition, Required Before an Action Is Maintainable Under the Antitrust Laws, Exists by Reason of Respondent's Refusal to Deal or Would Have Existed Had Petitioner Signed the Franchise Contract Proffered.

There must be injury to the public, *i. e.*, the consumer, before any act can constitute a restraint of trade under the antitrust laws—and this is so whether that act be of a kind which falls, by virtue of judicial construction, within the generalized language of Section 1 of the Sherman Act or whether it falls within the explicit legislative descriptions of Section 3 of the Clayton Act. *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, 500; *International Shoe Co.* v. *F. T. Co.*, 280 U. S. 291, 298.

The relevant competitive market delineated in the complaint is the *wholesale* distributor market in radios, television sets and communications equipment.* Nothing that is done, as here, by a manufacturer, which is designed to affect, and which in fact affects, only the relations between it and its wholesale distributor, can have any effect on the public retail-consumer market. Motorola radios, heaters and television sets will be sold by another distributor for the territory in question, and there is not even alleged an imagined temporary time lag in the replacement of petitioner, which petitioner was finally driven to rely upon as the supposed public injury resulting from respondent's action here. (Br., p. 18.) Respondent's action in no way attempts to impose conditions on the retail sale of its products to the public. The retail outlets in the standard radio appliances field each handle the products of several manufacturers, and the local retail dealers—from whom the public buys—will continue, as in the past, to devote their sales efforts to whichever brand, among the various lines each carries, is currently enjoying a competitive advantage. See Note, "Dealer Franchise Agreements," 63 Harvard Law Review, 1010, 1017 (1950). Motorola's communications equipment has never been sold at retail and will continue to be sold direct, by technically trained agents of the respondent, and the petitioner is now free to make its expert services available in either or both of these fields to any one of the numerous competitors of the respondent, including any struggling newcomers in the business.

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* Unlike the 75% restricted market conditions disclosed in *F. T. C.* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392, this case presents a situation "where by the nature of the market there is room for newcomers, irrespective of the existing restrictive practices." (p. 395.) Market restrictions *on the final outlets to the public* notwithstanding, this Court there sustained the validity of one year exclusive screening contracts.

No strategic business location is pre-empted from any of respondent's competitors by the existence of the petitioner—or of anyone else—as the exclusive wholesale outlet for respondent or for any other manufacturer in this large geographical area. In fact, petitioner's location has now been made available, for what it is worth, to respondent's competitors. Any new distributor, or any distributor for a new manufacturer, could freely enter the wholesale market, or into the sale of tailor-made communications systems to potential users in this area, simply by opening an office somewhere in the territory; and his success would depend solely on his ability as a salesman and the quality of his product.

Regardless of how large a radio manufacturer is, or what his "share" of the radio industry is (and whatever may be said of a case, such as *Standard Oil Co.* v. *U. S.*, 337 U. S. 293, where a whole industry, including all those manufacturers who individually control a substantial share of the line of commerce involved, is characterized by a pattern of exclusive supply contracts with retailers having strategically located outlets), the employment, as is alleged in the present case, of a system of exclusive one-year distributorships on the *wholesale* level as the initial step in the marketing of a product is not within the ban of Section 3 of the Clayton Act. *Boro Hall Corp.* v. *General Motors Corp., supra,* 124 F. 2d at p. 823, 130 F. 2d at p. 196); *Brosious* v. *Pepsi-Cola Co., supra,* 59 F. Supp. at p. 432 (where an exclusive wholesaler was held to have the right to seek to impose on a sub-distributor an exclusive dealership arrangement); *Ford Motor Co.* v. *Boone,* 244 Fed. 335, 341 (C. C. A. 9th, 1917); *B. S. Pearsall Butter Co.* v. *F. T. C.,* 292 Fed. 720 (C. C. A. 7th, 1923); *United States* v. *Imperial Chemical Industries,* 105 F. Supp. 215, 244 (S. D. N. Y., 1952).

These facts demonstrate the factual impossibility here of

injury to the consuming public. In other words, if a customer can still go into a retail store in Mobile today and buy a Motorola radio, as he can insofar as this complaint is concerned, and if potential users of two-way communication systems still have freely available to them in this area the bids of all manufacturers, how can it be said that any member of the consuming public has been injured in any way by whatever may have happened to petitioner? The prospective customer and the consuming public generally are wholly indifferent as to whether the retailer purchases his radios from distributor Nelson, distributor Jones or distributor Smith. This point also makes it clear that, insofar as this complaint discloses, there is no restraint whatever upon the interstate or intrastate sale of Motorola products.

Petitioner has *not* alleged, because it cannot:

1. That respondent's action has in any way foreclosed or was intended to foreclose any of the many manufacturers, old or new, who compete with respondent, from access to the wholesale distributor market or to the retail consumer market, or that the competition between such manufacturers has been in any way lessened or restrained at any level; or

2. That respondent's action has in any way affected or was intended to affect the conditions under which the consumer buys on the retail market; or

3. That respondent's action has in any way limited or was intended to limit the opportunity which petitioner (or anyone else) would otherwise have to become a distributor of any products competing with respondent's products, or has in any way lessened the competition between the various manufacturers' products in this field at any market level.

Such a situation as is presented by the present case is

totally unrelated to the cases, relied on by petitioner, which condemn a manufacturers' association or a manufacturer-dealer association whose purpose and effect is to limit the availability of goods to the general public. In the present case there is not only no such limitation or effect on the public market but there is also entirely lacking the element of combination and illicit concert of action which gives the potential power to deprive purchasers or consumers of the advantages of free competition. See *Fashion Originators Guild* v. *F. T. C.*, 312 U. S. 457, 467-8; *Montague* v. *Lowry*, 193 U. S. 38, 41.

It is this failure and inability to allege any facts tending to show public injury which stamps the petitioner's amended complaint as without substance under the antitrust laws.

The cases involving treble damage claims brought because of the cancellation of distributor or dealer franchises uniformly hold that public injury to free competition, as required under the antitrust laws, does not exist in such cases. See, *e. g.*, *Fedderson Motors, Inc.* v. *Ward*, 180 F. 2d 519, 521-2 (C. A. 10th, 1950); *Riedley* v. *Hudson Motor Car Co.*, 82 F. Supp. 8, 10; *Brosious* v. *Pepsi-Cola Co.*, 59 F. Supp. 429, 432, aff'd 155 F. 2d 99 (C. A. 3rd, 1946); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 828 (D. Md., 1938); *Boro Hall Corp.* v. *General Motors Corp.*, 37 F. Supp. 999, aff'd 124 F. 2d 822, pet. for reh. den., 130 F. 2d 196 (C. C. A. 2d, 1942); *Neumann* v. *Bastian-Blessing Co.*, 70 F. Supp. 447, 448, 449 (N. D. Ill., 1947); *Dublin Distributors* v. *E. & J. Burke*, 109 F. Supp. 125, 127-8 (S. D. N. Y., 1953).

Thus petitioner's intimation, that the kind of exclusive wholesale distributorship contract proffered him by respondent was in any way invalid under the antitrust laws, or that respondent's refusal to deal on any other terms was likewise invalid, is wholly lacking in substance.

B. The Exercise by Respondent Corporation of Its Right to Refuse to Deal with a Single Distributor for Reasons of Its Own Choosing Cannot at the Same Time Constitute an Improper "Attempt" to Violate the Antitrust Laws.

Neither Section 1 of the Sherman Act, which is a criminal statute, nor Section 3 of the Clayton Act, purports to cover *attempts.*

The Clayton Act expressly preserves the simple refusal to deal as a means of fostering competition, and does not countenance the denial of this right under the guise that its exercise involves an attempt to violate the purpose of the antitrust laws. There is a fundamental difference, within the meaning and policy of the antitrust laws, between the act of refusing to deal (which leaves the person refused the opportunity to deal freely with others) and the execution of a contract which prevents a person from dealing with others. (See Opinion below, R. 65.)

It is unthinkable that respondent's right to select customers could have been converted into an unlawful attempt to violate the antitrust acts by virtue of the very exercise of that right.

C. Nor Can the Exercise of Respondent Corporation's Right to Refuse to Deal Be Made Into an Unlawful "Conspiracy" by the Mere Exercise of That Right.

Petitioner relies on a conspiracy under Section 1 of the Sherman Act, which forbids "every contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States." (15 U. S. C. A. § 1.)

The Sherman Act does not purport to cover a "conspiracy" which consists simply in the intra-corporate processes of formulating the managerial policy of a single corporation. To suggest otherwise leads to such absurd results that the suggestion falls of its own weight. Take,

for instance, the traditional types of action which everyone will readily admit constitute—when done pursuant to a conspiracy—unlawful restraints of trade: price fixing, limiting of production, apportionment of customers, division of markets, and the supplying of inferior products. Can it be supposed that discussions among the officers of a corporation concerning the price at which the corporation will sell its product, the quantity which the corporation will produce, the type of customer or area of marketing which the corporation is interested in serving, or the quality of the product which the corporation chooses to put on the market result in the corporation being engaged in an unlawful restraint of trade under the Sherman Act?

Individual officers of one corporation can, by agreements made with the officers of another corporation, form a conspiracy to which the corporations and the officers acting for their respective corporations are parties. Also, officers of a corporation can presumably conspire among themselves in their individual capacities to restrain trade; and, if such individuals form a corporation and use the corporate entity merely as a mechanism for their preconceived conspiracy, then the corporate entity might be said to be within the conspiracy.

But such is not the present case. It is not claimed in any way that the officers of the respondent corporation were not acting simply and solely in their capacities as the necessary formulators of the business policies of an existing, *bona fide* manufacturing corporation.

In another area of "conspiracy"—that between a corporation and its subsidiaries—this Court has recently gone to the verge of the law, and in so doing has spoken in support of our position that no "conspiracy" within the meaning of Section 1 of the Sherman Act can exist in the circumstances of the present case. *Kiefer-Stewart Co.* v.

Seagram, 340 U. S. 211, 214; *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 606-7 (dissenting opinion of Mr. Justice Jackson). The colloquy between this Court and the Special Assistant to the Attorney General in the oral argument in the *Timken* case is particularly illuminating in its concession by the Attorney General that a single corporation cannot, as a matter of law, engage in a conspiracy in restraint of trade under Section 1 of the Sherman Act. (19 Law Week 3293.)

The net result of the petitioner's contention that a single corporation "conspires" when a decision relating to a selection of customers is made by the corporation's managerial officers and directors is simply to extinguish, by virtue of the very act of its exercise, the right expressly preserved to a seller under the anti-trust laws to select customers.

II.

THE COURT OF APPEALS PROPERLY APPLIED THE ABOVE, WELL-SETTLED PRINCIPLES TO THE CASE AT BAR, AND ITS DECISION IS CLEARLY CORRECT AND PRESENTS NO CONFLICT.

The decision of the Court of Appeals accords, as we have seen, with well-settled rules which have been uniformly applied in this type of case by the federal courts.

Petitioner's claimed conflict on the conspiracy question is without merit. This claim is based on the idea that cases *decided on the sole basis of an attempted monopolization by a single corporation under Section 2 of the Sherman Act* (which expressly covers an attempt by a single corporation to monopolize) conflict with the idea that a single corporation cannot itself be a conspiracy within the requirement of Section 1 of the Sherman Act. *Lorain Journal Co.* v. *U. S.*, 342 U. S. 143, 145; *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. 2d 600, 602 (C. A. 8th, 1942).

The use of the word "conspiracy" in connection with a charge of attempted monopolization by a single corporation under Section 2 of the Sherman Act is in no way controlling of the meaning of the word "conspiracy" in Section 1. The concept of conspiracy is intimately connected with the particular type of restraint of trade involved. The essence of a restraint of trade under Section 1 is, by definition, some sort of concert of action to accomplish purposes which could not be accomplished by, or which would not be unlawful if done by, a single business unit alone. Price-fixing (and, as here, selection of customers) are examples which clearly illustrate the real, *substantive* significance of the "conspiracy" requirement of Section 1. On the other hand, the essence of the restraint of monopolization under Section 2 is the fact of market control, whether by a single business unit or by a combination of independent units. Thus, in Section 2 cases, loose reference to an attempt by a single corporation to monopolize as a "conspiracy" is of no importance, since the substantive law is there the same in either case; and examples of such undiscriminating use of terminology, particularly when the court is referring simply to the allegations made in a complaint, cannot properly be imported into Section 1 and certainly cannot be made the basis of a purported conflict in decisions in a case involving a claim under Section 1.

The case of *Patterson* v. *U. S.*, 222 Fed. 599 (C. C. A. 6th, 1915), involved a charge of individual conspiracy by certain persons who were officers of a given corporation; the individuals were made defendants in a government suit under Sections 1 and 2 of the Sherman Act, *but not the corporation.* The *Patterson* case involved *no* corporate defendant and has nothing to do with the question passed upon by the courts below.

CONCLUSION.

The present case does not present any federal question of substance which was not decided correctly by the court below in accordance with principles long settled by this Court and other federal courts; nor does it present any conflict within the federal judiciary.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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